IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

DIANE M OLTMANN
Claimant

DOLGENCORP LLC
Employer

APPEAL NO. 15A-UI-07581-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/14/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 25, 2015, reference 01, decision that allowed benefits to the claimant, provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on June 8, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on July 23, 2015. Claimant Diane Oltmann participated and presented additional testimony through Julie Patterson. Jackie Bergstrom, Store Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five and B into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Diane Oltmann was employed by Dollar General as a part-time cashier/sales associate from 2011 until June 8, 2015, when Jackie Bergstrom, Store Manager, discharged her for failing to greet customers as they entered the Evansdale Dollar General store. Ms. Bergstrom transferred to the Evansdale store effective April 5, 2015 and became Ms. Oltmann's immediate supervisor at that time. The employer's written work rules require that employees greet customers as they enter the store. Ms. Oltmann was familiar with the work rule and knew that the employer emphasized the need to greet customers.

On the morning of June 8, 2015, Ms. Bergstrom was observing Ms. Oltmann via the employer's surveillance system and noted that Ms. Oltmann had failed to greet four customers as they entered the store. At about 10:15 a.m., Ms. Bergstrom summoned Ms. Oltmann to a meeting and discharged her from the employment. During the meeting, Ms. Bergstrom presented

Ms. Oltmann with a written reprimand. Ms. Oltmann signed the reprimand without adding any comments in the space available for employee comments.

On May 28, 2015, Ms. Bergstrom had issued a written reprimand to Ms. Oltmann for failing to greet customers, failing to thank customers as they left the store. The reprimand was also prompted by a customer's complaint that the customer had received bad service from Ms. Oltmann. Ms. Bergstrom and other members of management had been performing a store audit that day and had observed Ms. Oltmann fail to greet six customers as they entered the store. In the written reprimand, Ms. Bergstrom directed Ms. Oltmann to, "stay in your 309 ft area + say hi to everyone with a smile. every customer! No exceptions!" Ms. Oltmann signed the reprimand without adding any comments in the space available for employee comments.

On June 8, 2015, Assistance Manager Sharon Lovell had drafted a reprimand concerning Ms. Oltmann's alleged failure to greet customers on June 5, 2015. The employer did not present the reprimand to Ms. Oltmann. The written reprimand indicated on its face that it was a "final written counseling."

Ms. Oltmann had undergone thyroid surgery about a year before she was discharged from the employment. Ms. Oltmann asserts that her recovery from the surgery continue to impact her ability to greet customers at the time of the incidents that factored in the employer's decision to end the employment. Despite the purported lingering impact of the thyroid surgery, Ms. Oltmann never mentioned her surgery to Ms. Bergstrom. Ms. Oltmann had never provided the employer with any medical documentation suggesting that she was medically unable to greet customers or that she needed any accommodation in the workplace. Despite the purported prolonged recovery from the thyroid surgery, Ms. Oltmann continued to be a regular cigarette smoker, including during her breaks at work. Ms. Oltmann would regularly carry cough drops with her while at work.

Ms. Oltmann has provided a note for the appeal hearing form her primary care physician. The note is dated June 22, 2015, two weeks after her discharge from the employment. Ms. Oltmann obtained the note in anticipation of the June 24, 2015 fact-finding interview. The note states that Ms. Oltmann had undergone thyroid surgery and "[a]s a result of the surgery, she has had neck and throat pain. This could cause hoarseness." The note from two weeks after the discharge does not indicate that Ms. Oltmann was incapable of greeting customers as they entered the store.

Ms. Oltmann established a claim for benefits that was effective June 14, 2015 and has received $608.00 in benefits for the five weeks between June 14, 2015 and July 18, 2015.

On June 24, 2015, a Workforce Development representative held a fact-finding interview to address Ms. Oltmann's separation from the employment. Ms. Oltmann participated by providing an oral statement and by submitting the June 22, 2015 note from her primary care physician. The employer had appropriate notice of the fact-finding interview, but did not participate. On June 23, 2015, Equifax had provided Workforce Development with Ms. Bergstrom's name and with the number for the Evansdale store so that Ms. Bergstrom could be reached for the fact-finding interview. When the claims deputy attempted to reach Ms. Bergstrom at that number, no one answered and the claims deputy left a message. The employer had not provided any written documentation for the fact-finding interview. On June 26, 2015, two days after the fact-finding interview, Equifax filed the employer's protest in response to the notice of claim and attached the policy and reprimands to that filing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes that Ms. Oltmann did indeed fail to greet multiple customers on May 27 and on June 8, 2015 as the customers entered the store. Ms. Oltmann received a written reprimand on May 28, 2015 for the failure to greet customers on May 27. That reprimand did not place Ms. Oltmann on notice that her employment was in jeopardy. The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that Ms. Oltmann failed to greet customers on June 5, 2015. The employer had the ability to present testimony through Ms. Lovell regarding the alleged conduct from June 5, 2015, but elected not to present such testimony. The administrative law judge notes that the written reprimand regarding the alleged June 5 conduct was drafted on June 8, the final day of the employment. The weight of the evidence supports Ms. Oltmann's assertion that the employer never presented that particular reprimand to Ms. Oltmann for her signature and that employer's notation on the document that Ms. Oltmann "wouldn't sign" is false. The weight of the evidence establishes that Ms. Oltmann did not receive the "Final Written Counseling" prior to being discharged from the employment and did not know her employment was in jeopardy before the employer notified her on June 8 that she was discharged from the employment. With regard to the failure to greet some customers on May 27 and June 8, the evidence establishes a disregard of the employer's directive to provide the greeting. The weight of the evidence also indicates that Ms. Oltmann overstates the impact of her thyroid surgery on her ability to comply with the employer's directive to greet customers. The administrative law judge concludes that Ms. Oltmann's failure to greet customers on May 27 and June 8 involved insubordination, but that the conduct did not rise to the level of misconduct that would disqualify Ms. Oltmann for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Oltmann was discharged for no disqualifying reason. Accordingly, Ms. Oltmann is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 25, 2015, reference 01, decision is affirmed. The claimant was discharged on June 8, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs